RECORD AND BRIEFS

No. 141, Original

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In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

ON MOTION FOR LEAVE TO INTERVENE

Motion Of Elephant Butte Irrigation District For Leave To Intervene, And Memorandum Of Points And Authorities

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MOTION OF ELEPHANT BUTTE IRRIGATION DISTRICT FOR LEAVE TO INTERVENE

INTRODUCTION

Intervenor Elephant Butte Irrigation District ("EBID") moves for leave to intervene in this original jurisdiction action. On January 27, 2014, this Court granted plaintiff Texas' motion for leave to file a bill of complaint against New Mexico and Colorado, and invited New Mexico to file a motion to dismiss. On April 30, 2014, defendant New Mexico filed a motion to dismiss Texas' complaint, and the motion is pending. On November 3, 2014, this Court appointed a Special Master to hear the case. No proceedings have taken place before the Special Master. Therefore, EBID's motion is timely.

DISCLOSURE STATEMENT (Fed. R. Civ. P. 7.1)

EBID is a governmental organization created by an act of the New Mexico Legislature, and therefore is not required to file a disclosure statement under Rule 7.1 of the Federal Rules of Civil Procedure.

GROUNDS FOR THE MOTION

1. Identity of Intervenor Elephant Butte Irrigation District

EBID is an irrigation district and a New Mexico quasi-municipal corporation, duly incorporated and organized under New Mexico law, with its principal place of business in Dona Ana County, New Mexico. EBID was created pursuant to a New Mexico statute authorizing organization of an irrigation district to cooperate with the United States under the federal reclamation laws in providing water supplies from the lower Rio Grande for irrigation of lands in southern New Mexico. New Mexico Statutes, ch. 73, Art. 10, § 73-10-16. Under the statute, EBID is authorized to enter into contracts with the United States for the construction, operation and maintenance of facilities that would develop such water supplies, to enter into contracts with the United States in order to obtain water supplies from such facilities, and to construct, operate and maintain various facilities – canals, ditches, reservoirs, sites, water, water rights, rights-of-way and other property – necessary for this purpose. *Id.*

Pursuant to its statutory authority, EBID entered into a contract with the United States in 1938, which will be more fully described later in this memorandum, under which EBID provides water supplies from the Rio Grande Project for water users in the Project area in New Mexico. Under the contract, EBID receives 88/155th of the water supply of the Rio

Grande Project, and uses the water to irrigate 90,640 acres of land in New Mexico. EBID has 6,700 members to whom it provides the water supplies, and is currently representing the interests of these members in an adjudication of water rights in the Rio Grande Project that is pending in a New Mexico state court. *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (N.M. Third Jud. Dist. Ct., N.M.).[1]

2. Elephant Butte Irrigation District Meets the Standards for Intervention, and Should Be Allowed to Intervene.

This Court has held that, as a "general rule," a non-state party may intervene in an original action between two or more states in the Supreme Court – where the non-state party's state "is already a party" – if the non-state party sustains its "burden" of "showing some compelling interest in his own right,

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[1] EBID was preceded by the Elephant Butte Water Users Association ("EBWUA"), which was organized in 1905 by property owners situated along the Rio Grande in southern New Mexico, and which had entered into a contract with the U.S. Bureau of Reclamation for water deliveries from the Rio Grande Project, which Congress authorized in 1905. Act of Feb. 25, 1905, 33 Stat. 814 (1905). EBWUA was dissolved when EBID was organized pursuant to authority of New Mexico law to cooperate with the United States in providing water for irrigation from the lower Rio Grande, and EBID executed a contract with the United States on January 7, 1918, as the successor to EBWUA. *Holguin v. Elephant Butte Irrigation District*, 575 P.2d 88, 90 (1977).

apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010); *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam); *see Nebraska v. Wyoming*, 515 U.S. 1, 21-22 (1995); *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam); *Illinois v. Milwaukee*, 406 U.S. 91, 87 (1972).

As EBID explains in the attached memorandum, EBID meets the standards for intervention under this Court's decisions in *South Carolina*, *New Jersey* and other cases cited above. First, EBID has a "compelling interest in its own right," apart from its interest in a "class with all other citizens and creatures of" New Mexico, in intervening in this case. Second, EBID's interests are not "properly represented" by New Mexico, which is the state in which EBID resides. Third, EBID's interests are not properly represented by the other parties in this litigation, plaintiff Texas and intervenor United States. Therefore, EBID meets the standards for intervention and should be allowed to intervene.

3. Elephant Butte Irrigation District Asserts Different Legal Arguments Than the Parties, Which Provides an Additional Basis for Intervention.

EBID asserts different legal arguments concerning the issues raised in this case from the arguments

asserted by the other parties, Texas, New Mexico and the United States, and EBID believes that its intervention would enable the Court to better understand the complicated issues raised in this original jurisdiction action. First, EBID argues that Texas' complaint should be dismissed because, contrary to Texas' theory, the Rio Grande Compact does not apportion Rio Grande water to Texas, or apportion such water based on 1938 conditions. Second, EBID argues that – to the extent that the Compact was intended to protect Texas' rights in Rio Grande water – Texas' rights were to be protected by agreements between the United States and the water districts, namely EBID and its sister agency in Texas, the El Paso County Water Improvement District No. 1 ("EPCWID"), which allocated water between Rio Grande Project users in New Mexico and Texas; therefore, Texas should be permitted to amend its complaint to make such allegations. Third, EBID argues that under the federal reclamation laws as well as state appropriation laws, the Rio Grande Project is authorized to recover its return flows and seepage flows, to the extent that such seepage flows do not percolate into the aquifer and lose their identity as waters belonging to the Project. Therefore, New Mexico cannot properly authorize water uses in New Mexico that prevent the Project from recovering such return flows and seepage flows. By the same token, the United States does not have the right to recover seepage flows that percolate into the aquifer and thereby lose their identity as waters belonging to the Project; therefore, contrary to the United States' argument, the United States

does not have the right to use "hydrologically connected groundwater" for the Project.

As explained above, EBID's views on these issues are different from the other parties, and may be helpful to the Court in addressing the merits of Texas' complaint and New Mexico's motion to dismiss. For this additional reason, EBID should be allowed to intervene in this action.

CONCLUSION

Because of the foregoing reasons, this Court should grant EBID's motion for leave to intervene.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE

STATEMENT OF THE CASE

1. The Reclamation Act of 1902

In 1902, Congress enacted the Reclamation Act, which established a federal program to build and operate reclamation projects in the western states, in order to make the arid and semi-arid lands of the western states habitable and productive. Act of June 17, 1902, ch. 1093, 32 Stat. 388 (1902); *California v. United States*, 438 U.S. 645, 663-668 (1978). The projects are operated by the U.S. Bureau of Reclamation ("Reclamation"), a branch of the U.S. Department of the Interior. Section 8 of the Reclamation Act provides that the federal government must acquire water rights for the reclamation projects under state law. 43 U.S.C. § 383 (Secretary of Interior must "proceed in conformity with" state laws relating to "control, appropriation, use, or distribution of water used in irrigation"); *California*, 438 U.S. at 664-668. Under Section 8, the right to use water under the Act "shall be appurtenant to the land irrigated," and "beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372.

2. The Rio Grande Project Act of 1905

Shortly after passage of the Reclamation Act, Congress enacted the Rio Grande Project Act of 1905, which authorized construction of the Rio Grande

Project on the Rio Grande near Engle, New Mexico, the present site of the Elephant Butte Dam. Act of Feb. 25, 1905, 33 Stat. 814 (1905); *City of El Paso v. Reynolds*, 563 F.Supp. 379, 383 (1983). The purpose of the Rio Grande Project was to provide water for irrigation of lands in southern New Mexico and western Texas, and to fulfill the United States' anticipated treaty obligation to allocate a portion of Rio Grande water to Mexico. Pursuant to section 8 of the Reclamation Act, the United States acquired its water rights for the Rio Grande Project by filing notice, as required by the laws of the Territory of New Mexico.[1] The United States thus acquired the right to all unappropriated water in the Rio Grande and its tributaries for the Rio Grande Project for the benefit of EBID members.

3. The United States' Treaty With Mexico (1906)

In 1906, the United States entered into a treaty with Mexico for equitable apportionment of Rio Grande water between the two nations. *Convention Between the United States and Mexico providing for the Equitable Distribution of Waters of the Rio Grande for Irrigation Purposes*, May 21, 1906, 34 Stat. 2953

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[1] The United States' rights in the Rio Grande Project are currently being litigated in a general stream adjudication in a New Mexico state court, which was initiated by an action brought by EBID in the New Mexico state court. *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888, SS-97-104 (Third Jud. Dist. Ct., N.M.).

(1906) (hereinafter "Treaty"). The Treaty obligates the United States, upon completion of the proposed storage dam at the present site of the Elephant Butte Dam, to deliver to Mexico 60,000 acre-feet of water annually from the Rio Grande. Treaty, Art. I, 34 Stat. 2954. The Treaty also provides that water shall be distributed to Mexico in the "same proportions" that water is delivered to lands in the United States "in the vicinity of El Paso, Texas," as set forth in a specific delivery schedule. *Id.* at Art. II, 34 Stat. 2954. The Treaty also provides that in cases of "extraordinary drought," the amounts delivered to Mexico shall be "diminished in the same proportion" as the water delivered to lands in New Mexico and Texas. *Id.*

4. The Water Districts (EBID and EPCWID)

After Congress authorized the Rio Grande Project, two irrigation districts were formed, one in New Mexico and the other in Texas, to carry out the functions of the Project in their respective states. In New Mexico, the property owners along the lower Rio Grande organized a water users association in 1905, the Elephant Butte Water Users Association ("EBWUA"), which in 1918 was dissolved and replaced by the Elephant Butte Irrigation District ("EBID"). EBID was created under New Mexico law for the purpose of "cooperating" with the United States in developing project water supplies for irrigation of lands situated along the Rio Grande in southern New Mexico. New Mexico Statutes, ch. 73, Art. 10, § 73-10-16; *Holguin v. EBID*, 575 P.2d 88, 90

(N.M. 1977). On January 7, 1918, EBID, as successor to EBWUA, executed a contract with the United States, under which the United States agreed to provide water from the Rio Grande Project to the irrigation district in order to irrigate the lands within the district. *Holguin*, 575 P.2d at 90.

In Texas, the property owners situated along the Rio Grande in Texas organized a water users association, the El Paso Valley Water Users Association, which in 1917 was dissolved and replaced by the El Paso County Water Improvement District No. 1 ("EPCWID"). EPCWID was organized under Texas law to represent water users in Texas in acquiring and using Project water for irrigation of lands in Texas. *See El Paso Cnty. Water Improvement Dist. No. 1 v. City of El Paso*, 133 F.Supp. 894, 914 (W.D. Tex. 1955), *aff'd as modified*, 243 F.2d 927 (5th Cir. 1957).

5. The Rio Grande Project

The Rio Grande Project, which began construction in 1910 and was completed in 1916, extends from Elephant Butte Reservoir, which is located on the Rio Grande in New Mexico about 100 miles north of the New Mexico-Texas border, to Ft. Quitman, Texas, which is located in Texas about 80 miles southeast of El Paso, Texas. National Resources Committee, Regional Planning, Part IV, *The Rio Grande Joint Investigation in the Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937*, at 73 (1938) (hereinafter "Joint

Investigation"). The central features of the Rio Grande Project are the Elephant Butte Dam and Reservoir and the Caballo Dam and Reservoir, which is located in New Mexico about twenty-five miles downstream from the Elephant Butte Reservoir.[2] The Elephant Butte and Caballo dams impound Rio Grande water in their respective reservoirs, and the water, once released, then flows downstream and is diverted by six diversion dams[3] into canals running on each side of the river, from which the water is then delivered to nearby farmlands in order to irrigate the lands and grow crops. As the result of a Takeover Contract between the United States and EBID signed in 1980, which will be described more fully later, EBID operates and maintains the diversion dams in New Mexico and delivers the water to the canals for both districts, and delivers the water to the farmlands in New Mexico. *See City of El Paso v. Reynolds,* 563 F.Supp. 379, 380, 383 (D.N.M. 1983).

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[2] A map of the Project is attached as Appendix B to Texas' Brief in Support of Motion for Leave to File Complaint, at page A-2.

[3] The six diversion dams located below the Caballo Reservoir are, in sequential order, the Percha, Leasburg, Mesilla, American, International and Riverside Diversion Dams. The Percha and Leasburg Diversion Dams are located in New Mexico, and divert water to EBID. The Mesilla Diversion Dam is also located in New Mexico, and diverts water to both EBID and EPCWID. The Percha, Leasburg and Mesilla dams are operated and maintained by EBID under the 1980 Takeover Contract.

After EBID diverts Rio Grande water from the river and delivers it to farmlands in the district, a substantial portion of the used water is returned to the river through a drain system that was completed by the United States in 1916. Joint Investigation 73, 85. As a result of the Takeover Contract that will be described later, the drain system, which totals 457 miles in New Mexico, is owned and operated by EBID. The drain system was designed as part of the Project to allow used water to be returned to the river, and thus to be reused several times as the river flows through the Project area. Joint Investigation, 47-49, 55, 100. Additionally, a portion of the used water that is not captured in the drain system seeps into the ground, and is also capable of being returned to the river for additional downstream use. This process of diverting water for irrigation use and returning the drain flows and seepage flows to the Rio Grande is repeated several times, as the Rio Grande flows downstream through New Mexico and into Texas.

These drain flows and seepage flows are a vital component of the Rio Grande Project, because they allow the same water to be reused several times as part of the Project's water supply and thus enable the Project to fulfill its congressionally-authorized purpose by providing irrigation water for lands in New Mexico, Texas and Mexico. Because the drain flows and seepage flows are returned to the river for subsequent use, the Rio Grande Project typically delivers much more water for irrigation use than it actually releases from the Elephant Butte and Caballo

Reservoirs; in a full supply year, the Project releases an average of roughly 790,000 acre-feet of water from the reservoirs, and delivers an annual average of 930,000 acre-feet of water to irrigation users. *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888, SS-97-104, decision at p. 6 (Third Jud. Dist. Ct., N.M.). Thus, the drain flows and seepage flows are essential to fulfillment of the congressional purposes of the Rio Grande Project.

6. The Rio Grande Compact (1938)

As a result of increasing diversions of Rio Grande water in Colorado and New Mexico above Elephant Butte Reservoir commencing in the 1920s, the flow of Rio Grande water into Elephant Butte Reservoir was substantially reduced. Accordingly, the three states through which the Rio Grande passes – New Mexico, Texas and Colorado – entered into a compact, the Rio Grande Compact ("Compact"), to apportion the waters of the Rio Grande. The Compact was approved by representatives of the three states in 1938, ratified by the legislatures of the states in 1939, and approved by Congress in 1939. Act of May 31, 1939, ch. 155, 53 Stat. 785 (1939). Since Congress has consented to the Compact, the Compact is federal law. *New Jersey v. New York*, 523 U.S. 767, 811 (1998); *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). The Compact's purpose, according to its preamble, is to "effect[ ] an equitable apportionment" of Rio Grande waters. Preamble, 53 Stat. 785. The Compact is administered by the Rio Grande Compact Commission ("Commission"),

which is composed of one representative from each of the states of Colorado, New Mexico and Texas. Compact, Art. XII, 53 Stat. 791.

Under the Compact, Colorado is obligated to deliver a specified quantity of water at certain times of the year "at the Colorado-New Mexico State Line." Compact, Art. III, 53 Stat. 787.[4] New Mexico is obligated to deliver a specified quantity of water at certain times of the year "at San Marcial," which is located directly above the Elephant Butte reservoir. Compact, Art. IV.[5] The requirement that the water be delivered "at San Marcial" was changed in February 1948 to "into Elephant Butte Reservoir" by a Resolution adopted by the Rio Grande Compact Commission.

The Compact also provides that Colorado and New Mexico shall each receive "credit water" for any Rio Grande water that they deliver in excess of their obligations under the Compact, and shall be charged

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[4] Specifically, Colorado is obligated to annually deliver an amount of Rio Grande water, as measured at or near Lobatos, that is "ten thousand acre feet less than the sum of those quantities set forth in" specified "tabulations of relationship," which "correspond to the quantities at the upper index stations." Compact, Art. III, 53 Stat. 787.

[5] Specifically, New Mexico is obligated to annually deliver an amount of Rio Grande water at San Marcial, except for the months of July, August and September, that is "the quantity set forth in" specified "tabulations of relationships," which "corresponds to the quantity at the upper index station." Compact, Art. IV, 53 Stat. 788.

with "debit water" for any Rio Grande water that they fail to deliver in accordance with their obligations under the Compact. Compact, Art. I(g), -(h), -(i), -(j), -(m), 53 Stat. 785-792. The Project's "usable water" – that is, water available to serve the Project purposes – is all water, "exclusive of credit water," that is in Project storage and available for release in accordance with irrigation demands, including deliveries to Mexico. *Id.* at Art. I(l), 53 Stat. 786.[6]

Although the Compact effects an "equitable apportionment" of Rio Grande water, 53 Stat. 785, the Compact, in EBID's view, does not effect an equitable apportionment of water among the three states, Colorado, New Mexico and Texas. The Compact requires Colorado to deliver a specified quantity of Rio Grande water to New Mexico at the boundary between the two states, but does not similarly require New Mexico to deliver a specified quantity of Rio Grande water to Texas at the boundary between the two states. Instead, the Compact requires New Mexico to deliver a specified quantity of Rio Grande water at the Elephant Butte Reservoir, which is about 100 miles north of the New Mexico-Texas border. The Compact contains no provision requiring that New Mexico

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[6] "Project Storage" is "the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande Project," but not more than a total of approximately 2.6 million acre-feet. Compact, Art. I(k), 53 Stat. 786. Thus, "project storage" includes only "usable" water, not "credit" water. *Id.*

deliver a specified quantity of water to Texas at the boundary between the two states, or at any other location. The Compact makes no mention of any specific allocation of Rio Grande water to Texas.

Thus, the Rio Grande Compact, unlike most interstate compacts that apportion interstate waters among different states, does not apportion Rio Grande water among the compacting states. Instead, the Compact (1) apportions Rio Grande water between the two upstream states, Colorado and New Mexico, by requiring Colorado to deliver a specified quantity of water to New Mexico, and (2) apportions the remaining Rio Grande water between (a) New Mexico above the Rio Grande Project and (b) the Rio Grande Project itself, by requiring New Mexico to deliver a specified quantity of water to the Project. In short, the Compact does not apportion any Rio Grande water to Texas, but instead apportions water to the Rio Grande Project, which serves users in New Mexico, Texas and Mexico. *City of El Paso v. Reynolds*, 563 F.Supp. 379, 385 (D. N.M. 1983).

The Compact contains no provision that apportions Rio Grande water *within* the Rio Grande Project area itself, that is, between water users in the Project area in New Mexico and Texas. Although a specific quantity of Rio Grande water – 60,000 acre-feet per year – is allocated to Mexico under the United States' Treaty with Mexico, 34 Stat. 2954, no mention is made in the Compact of any specific allocation of water between New Mexico and Texas, or between water users in the two states.

7. The United States' and the Water Districts' Contracts

A. The Apportionment Contracts

Although the Compact does not apportion Rio Grande Project water between New Mexico and Texas, the two irrigation districts in New Mexico and Texas that have been created by their respective legislatures – EBID and EPCWID – have entered into a contract with the United States, which effectively apportions Rio Grande water between the two states, by apportioning water between the users in the Project area in the two states. Thus, the water is apportioned between New Mexico and Texas not by the Compact, but instead by the contract between the irrigation districts and the United States.

Specifically, EBID and EPCWID entered into a contract on February 16, 1938, which was agreed to and approved by the Secretary of the Interior on April 11, 1938, and which provided that the allocation of Rio Grande Project water between the two irrigation districts shall be in proportion to the acreage contained in the two districts.[7] The amount of acreage in the districts is approximately 155,000 acres, approximately 88,000 acres of which are in EBID and approximately 67,000 acres of which are in EPCWID. *Id.* at p. 1. Thus, the water apportioned to EBID is 88/155, or approximately 57%, of the available supply,

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[7] A copy of the February 16, 1938, contract is attached as an Appendix to the Brief of the United States as Amicus Curiae.

and the water apportioned to EPCWID is 67/155, or approximately 43% of the supply. *Id.* The contract also provides that in the event of shortages, the distribution of the available water between the districts shall be made in the same proportion. *Id.* Under this apportionment, each acre of land with the Rio Grande Project area is entitled to the same amount of Project water as any other acre of land, regardless of the source of the water or the district in which the acre is located.

B. The Takeover Contracts

After the United States completed construction of the Rio Grande Project in 1917, the two irrigation districts, EBID and EPCWID, entered into separate reimbursement contracts with the United States, under which the districts agreed to reimburse the United States for its costs in constructing the Project in their respective states, and the United States agreed that, when the costs are reimbursed, the United States would transfer operation and maintenance of the Project facilities to the districts. *El Paso County Water Improvement Dist. No. 1 v. City of El Paso*, 133 F.Supp. 894, 900 (W.D. Tex. 1955); *Holguin v. Elephant Butte Irrigation Dist.*, 575 P.2d 88, 90 (N.M. 1977). After EBID and EPCWID completed their reimbursement payments to the United States, the United States entered into separate contracts with EBID and EPCWID in 1980 – the "Takeover Contracts" – under which the districts assumed operation and maintenance responsibilities for the

delivery of Project water to their members. In 1992, Congress enacted Public Law 102-575, which directed the Secretary of Interior to transfer title to EBID of all right, title and interest in the easements, ditches, laterals, canals, drains, and rights-of-way of the Project. Act of Oct. 30, 1992, 32 Stat. 388. The deed that transferred title to EBID, executed on January 19, 1996, marked the first transfer of title in the history of the federal reclamation program to a district that has reimbursed the costs of a federal reclamation project.

Notwithstanding the Takeover Contracts, the United States continues to own and operate the Elephant Butte and Caballo dams and reservoirs. The United States also continues to own the diversion dams in the river, but the Takeover Contract provides that EBID operates and maintains the diversion dams in New Mexico that divert Rio Grande water to both water districts for irrigation uses. Thus, EBID is contractually obligated to divert Project water from the diversion dams that provide supplies to both districts, and to maintain and operate the drainage system that captures the drain return flows and seepage flows and puts the water back into the river for further use in the Project area in New Mexico and Texas.

8. The New Mexico General Stream Adjudication

The Rio Grande Compact addressed the rights and duties of the signatory parties – New Mexico,

Texas and Colorado – to the surface waters of the Rio Grande, but made no mention of the signatories' rights to the groundwater. Accordingly, EBID brought an action in 1986 in a New Mexico state court for an adjudication of all water rights in the Rio Grande, including rights in groundwater, between Elephant Butte Reservoir and the New Mexico-Texas state line. *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (Third Jud. Dist. Ct., N.M.). The action was brought against the New Mexico state engineer, the United States, the City of El Paso, and "all known and unknown claimants" to Rio Grande water in the affected portion of the river. *See Elephant Butte Irrigation Dist. v. Regents of New Mexico State University, et al.*, 115 N.M. 229, 230, 849 P.2d 372 (N.M. 1993). EPCWID, although not named in the action, has participated as an amicus. EBID brought its action to protect its rights in Project water in New Mexico by seeking a determination of the amount and priority of its right, which would protect EBID's Project supply from junior appropriators and prevent the State Engineer from issuing any more groundwater permits until the adjudication was completed.

Although the New Mexico state engineer initially opposed EBID's action for a general adjudication of water rights, the state engineer changed his mind and, after being realigned as a plaintiff, filed an amended complaint against EBID and others, which also sought an adjudication of all water rights between Elephant Butte Reservoir and the New Mexico-Texas

state line. *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist., et al., supra*; *see United States v. Las Cruces*, 289 F.3d 1170, 1177-1178 (10th Cir. 2002). After filing the amended complaint, the state engineer began to conduct hydrological surveys of different sections of the river system, as mandated by New Mexico's statutory stream adjudication process. *Las Cruces*, 289 F.3d at 1177-1178.

One phase of the adjudication process – denominated as Stream System Issue 104 – seeks to adjudicate the United States' water rights for the Rio Grande Project. In that phase, the United States claims the right to Rio Grande surface water and Project return flows, and also groundwater that is hydrologically connected to the river. The adjudication court held that the United States – based on the filing of its claims in 1906 and 1908 – had the right to appropriate Rio Grande surface water, but declined to decide whether the United States had the right to the Project return flows or hydrologically connected groundwater. Instead, the court held that the United States' rights to the return flows and groundwater should be determined by the New Mexico state engineer as part of the administrative process for adjudicating water rights. *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist., et al., supra* (SS-97-104).

9. The Operating Agreement (2008)

Because of increased groundwater pumping in New Mexico that reduced the flow of Rio Grande water reaching Texas, EPCWID brought an action in the Texas courts against the United States and EBID, seeking an order directing the United States to operate the Rio Grande Project in accordance with the Rio Grande Project Act and the contracts between EPCWID, EBID and the United States. *El Paso Cnty. Water Improvement Dist. No. 1 v. Elephant Butte Irrigation Dist., et al.*, No. EP07CA0027 (W.D. Tex. 2007). To settle the lawsuit, the United States, EBID and EPCWID entered into an Operating Agreement in 2008, which established an operational plan and allocation procedure for Rio Grande Project water. The Operating Agreement resolved the issue concerning the proper allocation of Project water between users in New Mexico and Texas as a result of increased groundwater pumping in New Mexico.

Under the Operating Agreement, EBID and EPCWID are allowed to carry over, or "bank," their allocation of Rio Grande water from one year to the next, rather than using their entire allocation in a single year. Operating Agreement, ¶¶ 1.8-1.11, pp. 2-3. As a result of the carryover provision, EPCWID will be allowed to carry over, and thus receive, more Rio Grande water than it has received in recent years, which will have the effect of alleviating the harm to Texas caused by increased groundwater pumping in New Mexico. The carryover provision was a substantial concession to EPCWID, because EPCWID has a

much greater incentive to conserve its allocation than EBID because of the urbanization of the Texas portion of the Rio Grande Project.

On the other hand, the Operating Agreement also limited the harm to groundwater pumpers in New Mexico, by changing the baseline for groundwater pumping in New Mexico from 1938, when the Compact was signed, to 1951-1978, when New Mexico experienced an unprecedented drought. By changing the baseline from the earlier date to the later date, the Operating Agreement effectively validated – and "grandfathered" – the rights of EBID member groundwater users in New Mexico who had increasingly extracted groundwater to supplement their surface water supplies during the 1951-1978 drought period.

In December 2011, New Mexico brought an action against the United States in the New Mexico federal district court, challenging the validity of the Operating Agreement. *State of New Mexico v. United States et al.*, No. 11-cv-691-JOB-WDS (D. N.M. Dec. 20, 2011). The water districts, EBID and EPCWID, were subsequently brought into the action as defendants. New Mexico alleges that the carryover provision, by effectively allocating a greater portion of Project storage water to EPCWID than it had been receiving before, reduced the amount of Rio Grande water available to New Mexico under the Compact, and thus violated the Compact. New Mexico's action has been stayed by the New Mexico district court.

The State of Texas – apparently concerned that New Mexico's action in the New Mexico district court will not adequately protect Texas' rights in Rio Grande water – then filed its motion for leave to file its complaint in the Supreme Court. Texas' complaint alleges that the Compact apportions a specific quantity of Rio Grande water to Texas based on conditions that existed in 1938, and that New Mexico is violating the Compact by authorizing the interception, depletion and diversion of Rio Grande waters, including Project return flows, that the Compact equitably apportioned to Texas.

If Texas prevails in its Supreme Court action on the theory expressed in its complaint, the Operating Agreement presumably would no longer be operative, because the Operating Agreement reflects an attempt to resolve the New Mexico-Texas controversy based on current conditions rather than conditions existing in 1938, and the Operating Agreement assumes that the Compact did not apportion a specific quantity of Rio Grande water to Texas based on 1938 conditions. In EBID's view, such an outcome would adversely affect the interests of EBID members in New Mexico, by reducing availability of groundwater supplies for its members who have benefitted from the redrawn baseline, and would also adversely affect EPCWID's interests, and thus Texas' interests, by precluding EPCWID from being able to carry over Project storage water from year to year.

ARGUMENT

I. ELEPHANT BUTTE IRRIGATION DISTRICT MEETS THE STANDARDS OF INTERVENTION, AND SHOULD BE ALLOWED TO INTERVENE.

A. An Intervenor in an Original Supreme Court Action Between Two or More States Must Show That It Has a "Compelling Interest in Its Own Right," Apart from Its Interest in a "Class" With Other Citizens of the State, Which Interest is Not Properly Represented by the State.

This Court has held that as a "general rule" a non-state party should be allowed to intervene in an original action between two or more states in the Supreme Court – where the non-state party's state "is already a party" – if the non-state party sustains its "burden" of "showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *South Carolina v. North Carolina*, 558 U.S. 256, 130 S.Ct. 854, 863 (2010); *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam); *see Nebraska v. Wyoming*, 515 U.S. 1, 21-22 (1995); *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam); *Illinois v. Milwaukee*, 406 U.S. 91, 87 (1972). EBID meets these requirements and should be allowed to intervene.

B. Elephant Butte Irrigation District Has A "Compelling Interest" in its Own Right, Apart from Its Interest in a "Class" With Other Citizens of New Mexico, in Intervening in This Case.

First, EBID has a "compelling interest" in its own right, apart from its interest in a "class" with other citizens of New Mexico, in intervening in this case.

EBID was created by an enactment of the New Mexico Legislature for the purpose of "cooperating" with the United States in developing Rio Grande Project water supplies for irrigation of lands situated along the Rio Grande in southern New Mexico. New Mexico Statutes, ch. 73, Art. 10, § 73-10-16. EBID represents the interests of agricultural users in southern New Mexico who receive water supplies from the Project for irrigation of their lands, and is responsible for delivering the Project water supplies to these agricultural users. EBID has entered into contracts with the United States, under which the United States provides the Project water supplies to EBID, which EBID then distributes to the agricultural users in New Mexico. EBID has also entered into contracts with the United States and EPCWID under which EBID operates and maintains diversion structures in the Rio Grande that divert water for both districts. Pursuant to a congressional enactment, the United States transferred the title to the Project distribution and drainage system to New Mexico, and thus EBID now has ownership of this system. In operating the system, EBID is responsible for capturing

and delivering the Project return flows for use in the New Mexico and Texas portions of the Project. Under the Operating Agreement, EBID is responsible for ensuring that water deliveries ordered by EPCWID are properly diverted through Project facilities in New Mexico and reach EPCWID. Thus, EBID has significant responsibilities in carrying out the functions of the Rio Grande Project in providing water for irrigation uses in New Mexico and Texas.

In addition, although the United States calculates the allocation of Project water between EBID and EPCWID at the start of each year, EBID is responsible for determining the allocation of the water among its members and the timing of the United States' releases of Project water from Elephant Butte and Caballo reservoirs. Under the Operating Agreement, EBID coordinates the releases of Project water for both EBID and EPCWID, and for irrigators in New Mexico and Texas.

Beyond its significant responsibilities in operating, maintaining and managing the Rio Grande Project in New Mexico, EBID also has significant responsibilities in effectuating the purposes of the Rio Grande Compact, which is the focal point of Texas' complaint here. As previously stated, the Compact provides for an allocation of Rio Grande water to the Rio Grande Project, in order to protect the integrity and feasibility of the project by ensuring that it has adequate water supplies to meet its congressionally-authorized purposes. Since EBID is responsible for providing Project water to users in New Mexico,

EBID has the primary responsibility for effectuating the Compact purposes as applied to New Mexico. In addition, as the upstream district in the Project area in New Mexico, EBID is contractually obligated to coordinate the delivery of Project water to EPCWID in Texas.

In short, EBID bears major responsibilities for managing the New Mexico portion of the Rio Grande Project, coordinating the delivery of the Texas portion of the Project water, and effectuating the congressional goal of protecting the integrity and feasibility of the Rio Grande Project. EBID is the only entity in this case that bears these major responsibilities and is not currently a party in this litigation.

Finally, EBID represents Project water users in New Mexico who have the "beneficial interest" in the Project's water rights. This Court, describing the respective rights of the United States and the water users in water developed by federal reclamation projects under the Reclamation Act of 1902, has stated:

> "Although the government diverted, stored and distributed the water, the contention . . . that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and the contract referred to, *the water-rights became the property of the land owners, wholly distinct from the property right of the*

> *government in the irrigation works*. . . . The government was and remained simply a carrier and distributor of the water. . . ."

Nevada v. United States, 463 U.S. 110, 123 (1983) (emphasis added), *quoting Ickes v. Fox*, 300 U.S. 82, 94-96 (1937). The Court stated:

> Once these lands were acquired by settlers in the Project, the Government's "ownership" of the water rights was at most nominal; the *beneficial interest* in the rights confirmed to the Government resided in the owners of the land to which these water rights became appurtenant upon the application of Project water to the land.

Nevada, 463 U.S. at 126 (emphasis added). Therefore, the surface water users in New Mexico who receive Project water deliveries for irrigation of their lands possess the "beneficial interest" in the Project's water rights, and EBID represents these New Mexico water users. EBID is also awaiting a determination of its storage and diversion rights in the Project in the state adjudication proceeding, which will provide the legal basis for EBID to deliver Project water.

For the foregoing reasons, EBID has a "compelling interest" in its own right, apart from its interest in a "class" with other citizens of New Mexico, in intervening in this litigation.

C. Elephant Butte Irrigation District's Interests Are Not Represented By New Mexico.

EBID's interests in this case are not represented by New Mexico, the state in which EBID resides.

As mentioned above, EBID was created for the purpose of "cooperating" with the United States in developing Rio Grande Project water supplies for irrigation of lands situated along the Rio Grande in New Mexico. Thus, EBID's statutory mission is to ensure the integrity and feasibility of the Project, which serves water users in both New Mexico and Texas. To that end, EBID has entered into contracts with the United States and EPCWID that provide for an allocation of Project water between water users in New Mexico and Texas, and that ensure that adequate Project water supplies reach users in both states. On the other hand, New Mexico, although representing the interests of water users in New Mexico, including both Project and non-Project users, has no particular responsibility for ensuring the integrity and feasibility of the Project, and for ensuring that adequate Project water supplies reach users in the Project area in Texas. Thus, although EBID's and New Mexico's interests in this litigation converge in some respects, they diverge in other highly significant respects.

Because of their divergence of interests, EBID and New Mexico take divergent positions on several major issues relevant here. First, and most importantly,

they take divergent positions on whether the Operating Agreement, which EBID negotiated with the United States and EPCWID in 2008, promotes or impairs the goals of the Rio Grande Project and the Rio Grande Compact. EBID believes that the Operating Agreement promotes these goals by providing a fair and equitable allocation of water between Project water users in New Mexico and Texas. In EBID's view, the Operating Agreement provides a workable and practical – and equitable – resolution of a 28-year dispute between EBID and EPCWID, *i.e.*, between New Mexico and Texas, concerning the allocation of Project water between users in the two states. New Mexico, on the other hand, believes that the Operating Agreement impairs the goals of the Project and the Compact. New Mexico has brought an action in federal district court against the United States and EBID challenging the Operating Agreement, alleging that the Operating Agreement violates the Rio Grande Project Act and the Compact that effectuates the Act, and thus is illegal. *State of New Mexico v. United States et al.*, No. 11-cv-691-JOB-WDS (D. N.M. Dec. 20, 2011). Thus, while EBID believes that the Operating Agreement advances the Project and Compact goals by fairly allocating Rio Grande water between the two states, New Mexico believes that the Operating Agreement impedes these goals. Plainly New Mexico does not represent EBID's interests, or the interests of Project water users in New Mexico whom EBID represents, concerning the propriety and legality of the Operating Agreement.

Further, EBID and New Mexico also apparently disagree concerning whether Rio Grande Project return flows that result from drainage and seepage belong to the Project or instead are public waters subject to appropriation under the laws of New Mexico. Based on its complaint in the federal district court action in New Mexico, New Mexico apparently believes that the return flows are public waters of New Mexico and thus are available for appropriation under New Mexico law. *State of New Mexico v. United States et al.*, No. 11-cv-691-JOB-WDS (D. N.M. Dec. 20, 2011). EBID, on the other hand, believes that the return flows belong to the Project because they are generated by the Project, and thus the return flows are not available for appropriation under New Mexico law.

Additionally, as will be explained more fully in Argument No. II(B) below, EBID believes that the dispute between Texas and New Mexico concerning the interpretation of the Compact and the proper allocation of Rio Grande water primarily involves principles of federal law rather than New Mexico law, and therefore that this Court is the appropriate forum in which to resolve the dispute. New Mexico, on the other hand, believes that these issues can properly be resolved by New Mexico courts applying principles of New Mexico law, and thus that Texas cannot pursue its claim under this Court's original jurisdiction. Again, New Mexico does not represent EBID's interests.

For all these reasons, EBID's interests are not represented by New Mexico.

D. Elephant Butte Irrigation District's Interests Are Not Represented By the Other Parties.

EBID's interests are not represented by the other parties in this litigation.

First, EBID's interests are not represented by Texas. Texas complains solely of harm to Texas and seeks relief solely for Texas, and does not complain of any harm to or seek relief for EBID. Further, Texas alleges in its complaint and its response to New Mexico's motion to dismiss that the Compact apportions a specific quantity of Rio Grande water to Texas based on 1938 conditions, and that New Mexico is interfering with Texas' apportionment of water by authorizing interception, depletion and diversion of water, including Project return flows, before the water reaches Texas. EBID, on the other hand, believes that the Compact did not apportion a specific quantity of Rio Grande water to Texas, much less apportion such water based on 1938 conditions. Instead, EBID believes that the Operating Agreement – not the Compact – provides an allocation of water to Project users in Texas, and thus to Texas itself. Also, EBID is located in New Mexico, and thus Texas cannot properly represent EBID's interests. For example, the Texas Compact Commissioner is appointed by the governor of Texas, and since EBID and its members

are located in New Mexico, they cannot vote and have no say concerning the appointments of the Texas Compact Commissioner. Thus, EBID's interests are not represented by Texas.

Second, EBID's interests are not represented by intervenor United States. Although the United States, like EBID, has an interest in the Rio Grande Project's fulfillment of its congressionally-authorized purposes, EBID – not the United States – is responsible both for diverting and delivering Project water to users in New Mexico, and for operating and maintaining diversion structures that deliver water to EPCWID in Texas pursuant to EBID's contracts with the United States. Also, the United States transferred to EBID ownership, operation and maintenance of the Project drainage and distribution facilities in New Mexico, after EBID completed its reimbursement to the United States for its costs in constructing the Project in New Mexico. Thus, EBID, not the United States, is responsible for operating the diversion and distribution facilities that transport Rio Grande Project water to farmers for use in New Mexico. Also, EBID owns and operates the Project drainage system that captures the water after its usage for irrigation and transmits the drain return flows back to the Rio Grande for further downstream uses of the Project to farmers in New Mexico and Texas. EBID is also responsible for determining the allocation of Project water to its members, and for determining the appropriate dates and times of Project water deliveries to its members. Also, as noted earlier, EBID – in

representing the interests of water users in New Mexico who receive Project water – represents those who have the "beneficial interest" in the Project's water rights. *Nevada v. United States,* 463 U.S. 110, 123 (1983); *Ickes v. Fox*, 300 U.S. 82-94-96 (1937). Thus, EBID's interests are not represented by the United States.

II. ELEPHANT BUTTE IRRIGATION DISTRICT SHOULD BE ALLOWED TO INTERVENE BECAUSE IT ASSERTS DIFFERENT ARGUMENTS RELATING TO THE ISSUES IN THIS CASE THAN THE ARGUMENTS ASSERTED BY THE OTHER PARTIES, WHICH WOULD BE HELPFUL TO THE COURT IN ITS RESOLUTION OF THE ISSUES.

EBID also should be allowed to intervene because – in addition to the other reasons described above – EBID's arguments concerning the issues in this case are different from the arguments of the parties, which would help the Court to better understand the complicated issues raised in the case. EBID's arguments on these issues are as follows:

A. Texas' Complaint Should Be Dismissed Because – Contrary to Texas' Complaint – the Rio Grande Compact Does Not Apportion Rio Grande Water to Texas, and Does Not Apportion Water Based on 1938 Conditions.

Texas contends in its complaint and opposition to New Mexico's motion to dismiss that the Compact apportions Rio Grande water to Texas, that the apportionment is based on conditions prevailing in 1938 when the Compact was signed, and that New Mexico is interfering with Texas' apportionment by authorizing interception, depletion and diversion of water, including Project return flows, before the water reaches Texas.

On the contrary, the Compact does not apportion Rio Grande water to Texas, much less apportion water based on 1938 conditions. Rather, the Compact (1) apportions Rio Grande water between Colorado and New Mexico, by requiring Colorado to deliver a specific quantity of Rio Grande water to New Mexico each year, and (2) apportions the remaining Rio Grande water between (a) New Mexico uses upstream from the Rio Grande Project and (b) the Project itself. The main concern of the 1938 Compact was that increased upstream uses were depleting Rio Grande waters before they reached the Project, and the main focus of the Compact was to ensure that sufficient water reached the Project to enable it to fulfill its congressionally-authorized purpose of providing water for irrigation uses in New Mexico and Texas. Thus,

the Compact goal was to ensure that sufficient water reach the Project, not to directly apportion the water between New Mexico and Texas. New Mexico's sole delivery obligation under the Compact is to deliver a specified quantity of water to the Project each year, but not to deliver a specific quantity of water to Texas at the New Mexico-Texas state line. Nothing in the Compact mentions any obligation by New Mexico to deliver a specific quantity of water to Texas at the state line.

Although the preamble of the Compact stated that its goal was to provide an "equitable apportionment" of water, 53 Stat. 785, this meant only that the goal was to equitably apportion the water between Colorado, New Mexico above the Project area, and the Project itself. Although the Compact provides for a system of credits and debits depending on whether Colorado and New Mexico deliver more water or less water to the Project area than they are required to do, Compact, Art. I(g), -(h), -(i), -(j), -(m), 53 Stat. 785-786, the system of credits and debits ensures only that sufficient water reaches the Project area to enable the Project to provide sufficient water for irrigation uses in New Mexico and Texas, and does not suggest that a specific amount of water is apportioned to Texas.

Further, nothing in the Compact indicates that Texas was entitled to water deliveries based on conditions existing in 1938, when the Compact was signed. The Compact contains no provision stating or implying the preservation of 1938 conditions. Any

such provision would have limited future development of water uses in the Project area in New Mexico and Texas, and nothing in the Compact indicates an intent to limit such future development of uses.

Therefore, to the extent that Texas alleges that the Compact apportions water to Texas based on 1938 conditions, Texas has failed to state a claim on which relief can be granted, and to that extent its complaint should be dismissed.

B. The Compact Contemplated that Texas' Allocation of Rio Grande Water Would Be Determined by Agreements Between the United States and the Water Districts, and Texas Should Be Allowed to Amend Its Complaint to Make Such Allegations.

Although, as stated above, the main Compact goal was not an apportionment of water to Texas, the Compact nonetheless contemplated that Texas' rights and interests in Rio Grande water would be protected by an agreement or agreements between the United States and the water districts – EBID and EPCWID – that represent water users in the Project area within the respective states. In 1938 – one month before the Compact was signed – the United States and the water districts signed a contract allocating water between water users in the Project area in New Mexico and Texas, which allocated the water based on the amount of Project land in each state. Thus, each acre of Project land was entitled to receive the same

amount of Project water, regardless of whether the land was in New Mexico or Texas. The Compact negotiators were well aware of this contract when they signed the Compact, and they intended and expected that the rights and interests of water users in the Project area in New Mexico and Texas would be protected by the contract. Indeed, the Texas Compact Commissioner stated contemporaneously that "the question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the districts under the Rio Grande Project and the Bureau of Reclamation. . . ." U.S. Brief in Opp. to Mot. to Dismiss 28. Since the contract provided that water would be allocated between the users in the two states based on the amount of Project land in each state, the contract provided a fair and equitable allocation of water between the users in the two states. In short, the Compact contemplated that the apportionment of water between New Mexico and Texas users in the Project area would be addressed by the contract between the United States and the water districts, and need not be directly addressed in the Compact itself. Cf. *Arizona v. California*, 373 U.S. 546, 580 (1973) (holding that under the Boulder Canyon Project Act the apportionment of Colorado River water between Arizona and California is determined by contracts signed by Secretary of Interior with users of the respective states).

More recently, as increased groundwater pumping in the Project area in New Mexico depleted the amount of water reaching Texas, the United States

and the water districts modified the 1938 contract by adopting the Operating Agreement of 2008, which balanced Texas' interests in obtaining more Project water and New Mexico's interests in allowing increased pumping of groundwater based on increased growth and an unanticipated drought in New Mexico. Under the Operating Agreement, each state was allowed to carry over its authorized storage from one year to the next, rather than using its entire storage in a single year (which effectively increased the amount of Project water flowing into Texas), in return for which the baseline for groundwater pumping in New Mexico was changed from 1938 to the drought years of 1951-1978 (which effectively "grandfathered" much of New Mexico groundwater pumping that had occurred subsequently to the Compact). The water districts, EBID and EPCWID, and the United States, in signing the Operating Agreement, determined that the Operating Agreement provided a fair and equitable allocation of Project water between New Mexico and Texas, and between the users in the respective states.

Since the Compact contemplated that the allocation of Project water between New Mexico and Texas would be established by a contract between the United States and the water districts, it follows that the 1938 contract signed by the United States and the water districts, as modified by the 2008 Operating Agreement, is a form of federal law, and therefore the 1938 contract and the 2008 Operating Agreement prevail over the laws of either New Mexico or Texas.

Therefore, while New Mexico is not obligated to deliver a specific quantity of Rio Grande water to Texas at the New Mexico-Texas state line, New Mexico cannot legally authorize water uses in New Mexico, including increased pumping of groundwater by non-EBID members, to the extent that such water uses interfere with the obligations of the United States and the water districts under the 1938 contract as modified by the 2008 Operating Agreement. Simply stated, the United States and the water districts are responsible for determining the appropriate allocation of water between Project water users in New Mexico and Texas through their contractual arrangements, and they have established these allocations by signing the 1938 contract and the 2008 Operating Agreement.[8]

If, as suggested above, Texas' complaint is dismissed on the ground that the Compact does not apportion water to Texas based on 1938 conditions, the Court should authorize Texas to file an amended complaint alleging, as argued above, that the 1938 contract between the United States and the water districts, as modified by the 2008 Operating Agreement, provides an allocation of water between water users in the Project area in the respective states, and

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[8] It follows that New Mexico's action challenging the validity of the Operating Agreement on the ground that it provides for delivery of more water to Texas than is authorized by the Compact, *see New Mexico v. United States*, No. 11-CV-0691 (D. N.M. Aug. 8, 2011), is without merit.

that New Mexico cannot authorize increased water uses in New Mexico by non-EBID members that interfere with the allocations established in these contracts and agreements. The question whether the Compact should be interpreted in the manner described above – that is, that the Compact contemplates that Project water allocations between New Mexico and Texas would be worked out in contractual arrangements between the United States and the water districts – involves a dispute between Texas and New Mexico concerning interpretation of the Compact and apportionment of Rio Grande water that is of sufficient "seriousness and dignity," *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992), to warrant resolution by this Court under its original jurisdiction. The question should not be resolved by the courts of New Mexico, as New Mexico argues, because "[a] State cannot be its own ultimate judge in a controversy with a sister State." *West Virginia v. Sims*, 341 U.S. 22, 28 (1951).

C. Under the Federal Reclamation Laws, the Rio Grande Project is Authorized to Recover Return Flows and Seepage Flows That Do Not Lose Their Identity as Project Waters, and New Mexico Cannot Properly Authorize Increased Water Uses in New Mexico That Prevent the Project From Recovering Such Flows.

Under the federal reclamation laws, a federal reclamation project is authorized to recover return

flows and seepage flows generated by the project. *Ide v. United States*, 263 U.S. 497, 505 (1924). The project's return flows and seepage flows plainly belong to the project, because the flows would not have existed absent the project. Indeed, the appropriation laws of the western states generally recognize the same principle. Under the doctrine of recapture, "an appropriator who has diverted water for irrigation purposes has the right to recapture and reuse his own runoff and seepage water before it escapes his control or his property." *Montana v. Wyoming*, ___ U.S. ___, 131 S.Ct. 1765, 1774 (2011).[9] Therefore, New Mexico cannot authorize increased water uses in New Mexico by non-EBID members, including in the Project area, that prevent the Project from recovering its return flows and seepage flows. To the extent New Mexico argues otherwise, its argument is misplaced.

In some cases, the Rio Grande Project seepage flows, as in the case of all seepage flows, percolate into the ground and become part of the native groundwater supply in the underlying aquifer. In such cases, the seepage flows can no longer be identified as Project waters, and therefore should be considered public waters available for appropriation under the laws of New Mexico. Therefore, the United States' argument that it is entitled to recover "hydrologically connected

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[9] Since the Rio Grande Project return flows remain on the "property" of the Project – even though they may have left the property of the individual irrigator – the doctrine of recapture applies to the Project return flows.

groundwater," and that such groundwater belongs to the Project and is not available for appropriation under New Mexico law, U.S. Brief in Opp. to New Mexico's Mot. to Dismiss, 30, 33, 37, 40, is also misplaced.

Although *California v. United States,* 438 U.S. 645 (1978), held that the United States must comply with state laws both in appropriating for and distributing water from federal reclamation projects, *California,* 458 U.S. at 665, 667, *California* also held that such state laws apply only to the extent they are not inconsistent with "clear congressional directives." *Id.* at 668. Congress authorized the Rio Grande Project Act in 1905 on condition that the Project is determined to be "feasible." 33 Stat. 814 (1905) (project authorized on condition that "there shall be ascertained to be sufficient land in New Mexico and in Texas which can be supplied with the stored water at a cost which shall render the project feasible and return to the reclamation fund the cost of the enterprise, . . . should all other conditions as regards feasibility be found satisfactory"). Since the Rio Grande Project return flows and seepage flows are necessary to fulfill the congressionally-authorized purpose of making the Project "feasible," New Mexico laws cannot be applied to Project water uses under *California* to the extent that they would render the Project infeasible by authorizing appropriation of Project return flows and seepage flows necessary to fulfill the Project purpose.

The Compact is a federal law, because it was approved by Congress. *See, e.g., New Jersey v. New York,*

523 U.S. 767, 811 (1998). Since the Compact contemplated that Texas' rights in Project water would be protected by agreements between the United States and the water districts, the Project's rights to recover the return flows and seepage flows are governed by the 1938 contract, as modified by the 2008 Operating Agreement, and are not subject to appropriation under New Mexico law. For this additional reason, *California* does not support New Mexico's argument that water uses in the Project area are governed by New Mexico law.

In sum, New Mexico's argument that it has the right to authorize water uses in the Project area that interfere with the Project's recovery of return flows and seepage flows is incorrect, and the United States' argument that it has the right to hydrologically connected groundwater is also incorrect.

CONCLUSION

For the foregoing reasons, this Court should grant Elephant Butte Irrigation District's motion for leave to intervene.

Respectfully submitted,

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